STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY (SBC ILLINOIS) and **ACCESS ONE, INC.** Joint Petition for Approval of Negotiated Interconnection Agreement dated May 15, 2003, pursuant to 47 U.S.C. § 252.	)	**DOCKET NO. 03-0408**

REPLY TO SBC ILLINOIS' RESPONSE TO STAFF'S MOTION TO DENY APPROVAL

Now comes the Staff of the Illinois Commerce Commission by their attorney, James E. Weging, and replies to SBC ILLINOIS' Response to the Motion of Staff that the negotiated agreement in Ill.C.C. Docket No. 03-0408 be rejected as contrary to the public interest, as announced in the Commission Order of May 13, 2003, in Ill.C.C. Docket No. 01-0662.

1. Staff does not seek to prohibit Illinois Bell Telephone Co. (SBC Illinois) and Access One, Inc.[1] from entering into a negotiated agreement (¶ 1 of SBC's Response). Staff seeks application of the only power that a state agency has in review of a negotiated agreement under 47 USC 252 (e) (2), the power to reject the negotiated agreement as being against the public interest. Until there is recognized a right of a state agency under 47 USC 252 to reject in part, Staff can only oppose the entire agreement no matter how limited the portion of the negotiated agreement which is against the public interest.

2. SBC argues that the below quoted provision has no bearing on the present case (¶ 4 and 6 of SBC's Response). The Commission Order of May 13, 2003, in Ill.C.C. Docket No. 01-0662 provides, *inter alia,* on pages 896-7:

[1] The parties will be hereinafter designated "SBC" and "Access One"

> "3520. As we see it, SBC Illinois has indicated its willingness to send another accessible letter advising CLECs of the adoption of the Section 271 Plan, and the Commission finds this to meet with our purposes. The Commission also directs SBC Illinois to modify the terms of its existing tariff in accordance with this Order. In addition, to ensure that the plan here found to be suitable in preventing backsliding is widely implemented, SBCI need commit to offering CLECs the opportunity to opt-in to the plan approved in this proceeding, that also being the performance remedy plan offered under SBCI's Alternative Regulation Plan. We agree with Staff that this might help to ensure, over time, that with the greatest possible number of CLECs taking the plan approved in this proceeding, the remedy amounts SBCI will pay thereunder most closely resemble the dollar amounts provided in this proceeding. As to those CLECs preferring to continue with their current remedy plans (if deemed lawful in relation to the respective changes-of-law provisions), such as the 13-state, 11-state, Covad, or merger plan, they should be allowed to continue with that existing remedy plan until such time as they either renegotiate a new remedy plan, or the term of their current interconnection agreement expires…."
>
> (emphasis supplied)

3. SBC's reading of the above underlined passage is that "As to those CLECs preferring to continue with their current remedy plans (if deemed lawful in relation to the respective changes-of-law provisions), such as the 13-state, 11-state, Covad, or merger plan, they should be allowed to continue with that existing remedy plan until such time as they either renegotiate a new remedy plan, or the term of their current interconnection agreement expires ***at which point those CLECs can continue to keep their existing remedy plans***." In other words, SBC believes that the above underlined clause is meaningless and that CLECs can continue the 11State plan past the existing termination date or can continue to take the 11State plan as Access One proposes herein. However, Staff cannot assume that the above provision of the May 13th Order is mere surplusage. *Cf*. *Produce Terminal Corp. v. Illinois Commerce Commission,* 412 Ill. 582, 597 (1953).

4. There is no provision within the May 13th Order which indicates that the preexisting remedy plans are to be offered in parallel to the two plans endorsed by that order. Indeed, if the Commission Approved Section 271 Plan is not intended to displace any other remedy plan offered or created by SBC, as SBC contends, then the endorsement of the "SBC Compromise Plan" as being in the public interest makes no sense (Par. 3558, p.906, Order of May 13, 2003). Why find that SBC and the CLECs

can agree to the "SBC Compromise Plan" if, as SBC contends, SBC and a CLEC can agree to any remedy plan other than the Commission Approved Section 271 Plan?

> "3558. On the entirety of our review and analysis, the Commission concludes that the Compromise Plan meets with, and will serve, the public interest. Our recommendation on SBC Illinois' Section 271 application, in this regard, is expressly conditioned on SBC's acceptance and referral of this plan to the FCC as herein modified. Further, it shall be designated and known hereafter as the Commission Approved Section 271 Plan. In modifying the Plan, however, the Commission does not preclude SBC Illinois and a CLEC from agreeing, in a negotiated interconnection agreement, to the language of SBC Illinois' original proposal."
>
> (emphasis supplied)

5. SBC argues (¶ 7 of SBC's Response) that Par. 3520 of the May 13th Order merely sought to give CLECs notice that the Commission Approved Section 271 Plan existed and could be specially opted into. However, that language makes more sense if the preexisting remedy plans are only to be continued for the short while and the CLECs will have to choose between the two plans endorsed by the May 13th Order no later than the termination date of their current negotiated agreements. Further, if a "widely implemented" Commission Approved Section 271 Plan prevents backsliding, does that not indicate that the preexisting remedy plans, such as the 11State Plan, do not prevent backsliding and so fail of one of a remedy plan's prime purposes? The sooner the CLECs opt into the Commission Approved Section 271 Plan, the earlier the benefits of that Plan will become widely available, such as the prevention of backsliding, which by implication the 11State Remedy Plan does not prevent. The language in Par. 3520 of the May 13th Order does not indicate that the preexisting remedy plans are to continue *ad infinitum* and, therefore, Access One should not be allowed to adopt this inadequate plan.

6. SBC cites to three Commission dockets, all of which were pending (Ill.C.C. Docket Nos. 03-0289 and 03-0256) or filed within a week (Ill.C.C. Docket No. 03-0344) of the issuance of the May 13th Order. The present case was filed more than a month after the issuance of the May 13th Order which allowed SBC and Access One sufficient time to comply with the May 13th Order. Staff believes that SBC did stop the filing of certain signed negotiated agreements when, SBC believed, the negotiated agreements violated the May 13th Order.

(a) In two of the cases (Ill.C.C. Docket Nos. 03-0289 and 03-0344),[2] the termination dates of the existing negotiated agreements were being extended and, therefore, the pre-existing remedy plans were being extended directly contrary to Par. 3520 of the May 13th Order, pp. 896-7. SBC claimed that, because other negotiated agreements filed around the same time had been approved either by Staff's Verified Statement or by Commission Order already, it would be inequitable to deny the negotiated agreements in Ill.C.C. Docket Nos. 03-0289 and 03-0344. *See respectively* SBC Response of June 25, 2003, pp. 4-5, Pars. 9 and 10, and SBC Response of June 26, 2003, pp. 4-5, Pars. 9 and 10. This was SBC's claim, not Staff's.

(b) In both dockets, besides enforcement of the May 13th Order, Staff sought clarification of when and how the May 13th Order was to be applied in negotiated agreement case. In the Order of July 23, 2003, in Ill.C.C. Docket No. 03-0289 and in the Proposed Order in Ill.C.C. Docket No. 03-0344, the following findings are made respectively :

> "(10) approval of the Agreement does not have any precedential effect on any future negotiated agreements or Commission Orders."
>
> "(9) approval of the Amendment does not have any precedential effect on any future negotiated agreements or Commission Orders."

(c) In view of the above findings, SBC's reference and reliance to those Orders are barred. SBC seeks to treat the Orders as precedential when the Commission expressly finds that they are not. Since the clarification which Staff sought is being denied by said findings, it is obvious that the Commission did not deem the reraising of the issue (extension of the termination date of existing negotiated agreements) in future cases to be a waste of time and administrative resources.[3]

(d) SBC's citation to the Ill.C.C. Docket No. 03-0256 is unusual. In that docket, Alticom took the 01-0120 Remedy Plan (Part 2 of the Joint Petition, #7 of 60), not the

[2] There were three other cases in a similar position. However, the CLECs in those three cases choose one of the approved remedy plans (Ill.C.C. Docket Nos. 03-0265, 03-0280, and 03-0342/03-0466).
[3] Staff is hoping that either the proposed order in Ill.C.C. Docket No. 03-0344 will be changed or that oral direction from the Commissioners will be given in that case, so there will be guidance in future negotiated agreement cases.

11State Plan. (The Indices to SBC's negotiated agreements are often inaccurate and have seldom, if ever, referenced the 01-0120 Remedy Plan when adopted in a negotiated agreement.) The case was filed almost a month before the issuance of the May 13th Order in Ill.C.C. Docket No. 01-0662. The hearing was held eight days after the issuance of the May 13th Order before Staff was aware that that Order had any restrictive language related to performance measurements/remedy plans. The Commission Order in Ill.C.C. Docket No. 03-0256 cannot be cited as precedent (Finding (9) of the July 9th Order). Finally, SBC has taken the position that CLECs cannot get the 01-0120 Remedy Plan since the issuance of the May 13th Order in Ill.C.C. Docket No. 01-0662, even if approved by the Commission, thus negating the effectiveness of the review of negotiated agreement process. *See* SBC's Comments of June 6, 2003, pp. 2-4, ¶ 4-10 in Ill.C.C. Docket No. 03-0262 and SBC's Comments of June 13, 2003, pp. 2-4, ¶ 4-10 in Ill.C.C. Docket No. 03-0302.[4] Especially inconsistent is SBC's claim (*Id*., ¶ 6, 9, &10) that the Commission Approved Section 271 Plan automatically replaces the 01-0120 Remedy Plan because of the May 13th Order, when the May 13th Order does not distinguish any of the pre-existing remedy plans from one another.

7. SBC makes no response to Par. 6 of Staff's Motion which notes that Ill.C.C. Docket No. 01-0662 was not a remedy plan case, but was establishing the requirements which SBC must meet to enter and stay in the interstate market. 47 USC 271. It is a matter of no small moment whether the two remedy plans endorsed by the May 13th Order are Section 271 requirements or whether no such requirement was being made. 47 USC 252 (e) (3). That is why, if this negotiated agreement is approved, Staff must presume that the Commission's May 13th Order did not create any such requirements. Unlike the other cases which deal with extension of the termination date of existing agreements, this case deals with the issue of the effect of the requirements of the May 13th Order directly.

[4] SBC withdrew its opposition to approval in both cases but, as far as Staff knows, did not change its position concerning its claim that the 01-0120 remedy plan can no longer be taken by CLECs.

8. SBC argues (¶ 9 of the Response) that, if the Commission were to reject any negotiated agreement for public interest grounds, said rejection violates "the spirit" of the federal Telecommunications Act. Rather, if this Commission were to approve negotiated agreements that are against the public interest or are discriminatory, this Commission would be failing to do its function under 47 USC 252 (e). If mere negotiation immunizes a negotiated agreement from rejection on public interest or discrimination grounds, then these review proceedings are utterly ineffectual and meaningless.

9. SBC argues (¶ 10 of the Response) that a number of CLECs have taken the Commission Approved Section 271 Plan. Staff does not doubt this. The issue is whether CLECs can continue to take remedy plans in Illinois that do not prevent backsliding and do not meet the minimal requirements for remedy plans established in the May 13th Order in Ill.C.C. Docket No. 01-0662. Access One can adopt the 11State Plan, in view of the May 13th Order, only if there are no remedy plan requirements being established in Ill.C.C. Docket No. 01-0662.

Wherefore the Staff of the Illinois Commerce Commission ask that the Negotiated Agreement between SBC and Access One be rejected as contrary to the public interest as expressed in the May 13th Order of the Commission in Ill.C.C. Docket No. 01-0662.

Respectfully submitted,

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James E. Weging

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NOTICE OF FILING

TO: Parties on Service List

PLEASE TAKE NOTICE that I have, on this 1st day of August, 2003 A.D., filed with the Chief Clerk of the Illinois Commerce Commission, the Reply of the Staff of the Illinois Commerce Commission to SBC's Response to Staff's Motion to Deny Approval, a copy of which is hereby served upon you.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Notice, together with a copy of the document referred to therein, have been served upon the parties to whom the Notice is directed by e-mail or, if without an e-mail address, by first class mail, proper postage prepaid, from Chicago, Illinois on the 1st day of August, 2003 A.D.

_____

JAMES E. WEGING

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Docket No. 03-0408
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